

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No.

77-1650

ELISEO GARZA,

Petitioner,

—v.—

AMADOR RODRIGUEZ,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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FILED

MAY 19 1978

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. _____

ELISEO GARZA,
PETITIONER,

-v.-

AMADOR RODRIGUEZ,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Eliseo Garza, prays that
a writ of certiorari issue to review the
judgment of the United States Court of
Appeals for the Fifth Circuit entered on
September 14, 1977, in favor of Amador
Rodriguez.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 559 F2d 259 and is set forth in the Appendix infra at pp. 10a to 17a, followed by the Court's judgment, p. 18a, and its order denying rehearing and rehearing en banc, p. 20a. The Judgment and Memorandum of the District Court are unreported; they are set forth infra at pp. 1a and 4a, respectively.

JURISDICTION

The order of the Court of Appeals denying Garza's petition for rehearing and rehearing en banc was entered on February 21, 1978. This Court has jurisdiction pursuant to 28 USC 1254(1).

QUESTIONS PRESENTED

1. In the circumstances of this case, did the Court of Appeals err in not ruling for petitioner or not remanding to the District Court for a hearing on the relevance of this Court's intervening decision in

Mt. Healthy Board of Education v. Doyle to the specific findings of fact made by the jury?

2. Did the Court of Appeals err in ignoring or failing to give proper weight to the specific facts found by the jury, in violation of the Seventh Amendment?

STATEMENT OF THE CASE

On February 6, 1976, respondent Amador Rodriguez, the Director of the Juvenile Probation Department of Cameron County, Texas, summarily discharged petitioner Eliseo Garza from employment as an investigator with the department.

Garza had been involved in an incident at the county jail on December 20, 1975, after being arrested for disorderly conduct and public intoxication, which charges he denied. No disciplinary action was taken against Garza at the time of the incident, and no criminal charges relating to the arrest were ever brought against him.

On February 6, 1976, Garza told Rodriguez that he intended to sue the

arresting officer in the December 20 incident, alleging that the officer had brutally mistreated him, in violation of his rights.¹ Upon learning of Garza's intention to sue, Rodriguez summarily terminated Garza's employment.

Garza then filed suit in federal court against Rodriguez and the County, claiming his discharge was unconstitutional and violated 42 U.S.C. 1983. At trial, the key issue was whether Garza was discharged because of the jail incident or because he expressed an intention to sue the officer for misconduct.

The jury determined all the material facts, finding that Garza's criticism of and suit against the policeman was "the principal reason" for which Garza was discharged (Special Interrogatory No. I; 1a),

1. Although the District Court's memorandum and order indicated that Garza "had filed a civil suit against the city policeman" prior to his termination (pp. 6a-7a), in fact, as the Court of Appeals correctly noted, immediately prior to termination Garza confirmed his "intention" to sue, but the suit was not actually filed until several weeks after termination. (p. 14a).

and that Garza's actions "did not impede proper performance of his daily duties... or substantially impede the legitimate operation of" the probation department (Special Interrogatory No. II; 1a). The essential facts were thus established by the jury.

After trial, the District Judge, agreeing with the jury findings, made certain supplemental findings and then ruled that "the findings of the jury, and the supplemental findings of this Court, have established that Plaintiff [Garza] was improperly discharged...." Memorandum and Order, 8a.

The District Court ordered Garza's reinstatement but no damages or back pay. Rodriguez and the County appealed the grant of injunctive relief to the Fifth Circuit Court of Appeals. Garza cross-appealed the denial of back pay. The Fifth Circuit reversed the district court's grant of injunctive relief, and affirmed the denial of back pay. In so ruling, the Fifth Circuit incorrectly applied Mt. Healthy Board of Education v. Doyle, 429 US 274 (1977), which was decided by this Court after the District Court had issued its order and after

appellate argument in the Fifth Circuit, and erred in failing to give proper weight to the facts found by the jury.

Garza has abandoned his claim for back pay or other relief against the County, and seeks certiorari only with respect to relief against respondent Rodriguez.

REASONS FOR GRANTING THE WRIT

THE LEGAL STANDARD APPLIED BY THE FIFTH CIRCUIT IS DIRECTLY CONTRARY TO THE LEGAL STANDARD REQUIRED BY MT. HEALTHY, AND ITS FACTUAL ASSUMPTIONS ARE CONTRARY TO THE FACTS ACTUALLY FOUND BY THE JURY.

This court decided Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977) after the District Court's judgment for Garza but prior to the Fifth Circuit reversal of that judgment. Mt. Healthy clarified the legal standard to be applied in order to determine whether termination of public employment is for a constitutionally impermissible reason. If there are two possible reasons for termination, one of which would be a constitutionally permissible reason for termination and one of

which would be a constitutionally impermissible reason for termination, the initial burden is on the employee to prove the impermissible reason was at least a "substantial" or "motivating" factor in the decision to terminate. If such a showing is made, the burden shifts to the employer to prove not only that he could have terminated the employee for the constitutionally permissible reason, but also that he in fact would have terminated the employee for the permissible reason, even if the constitutionally impermissible reason had played no part in his decision. 429 U.S. at 287. The employer must thus show (a), that he could have terminated the employee for a reason that would have been constitutionally permissible, and (b), that he would have terminated the employee for that reason alone, without regard to constitutionally impermissible reasons.

The crucial difference between "could" and "would," was stressed by this Court in Mt. Healthy:

Clearly the Board legally could have dismissed respondent had the radio station incident never come to its attention. One

plausible meaning of the court's statement is that the Board and the Superintendent not only could, but in fact would have reached that decision had not the constitutionally protected incident of the telephone call to the radio station occurred. (429 U.S. at 285; emphasis in original).

* * *

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. (429 U.S. at 287; footnote omitted; emphasis added).

The Fifth Circuit erred in failing to observe the distinction between "could" and "would." In applying Mt. Healthy to the facts of this case, the Fifth Circuit first ruled, correctly, that Garza, the employee, had met his initial burden. He proved to

the satisfaction of the jury, as reflected in Special Interrogatory No. I, p. 1a, that his intention to sue the arresting officer for violation of his civil rights was at least a "substantial" or "motivating" factor in the employer's decision to terminate his employment. (Indeed, the jury found that constitutionally impermissible reason was "the principal reason" for termination).

The Fifth Circuit then ruled, again correctly, that Rodriguez, the employer, had met the first part of his two-part burden. He had proved to the satisfaction of the trial judge that there was a constitutionally permissible reason for which he could have fired Garza, namely, Garza's conduct almost seven weeks earlier in connection with his arrest: "the District Judge found the County could have fired Garza because of his conduct of December 20. . . ." p. 14a. The Fifth Circuit then ruled, incorrectly, that that finding alone "requires reversal" under Mt. Healthy. p. 14a. That was error because there was no finding by the District Judge (or by the Court of Appeals) that Rodriguez "would" have terminated Garza for that constitutionally permissible reason,

only that he "could" have done so. Accordingly, the employer had not, on the facts of this case, met the second part of his burden under Mt. Healthy.

In fact, the employer had claimed and tried to prove termination was "primarily based on [his] conduct on December 20. . . .", (see p. 14a), but the jury did not believe that claim and found, to the contrary, that the "primary reason" for termination was the intended suit.

In those circumstances, the Fifth Circuit should either have ruled in favor of Garza, or should at least have remanded to the District Court for a Mt. Healthy hearing. Its ruling for Rodriguez can only be based on the factual assumption that Rodriguez "would" have fired Garza because of his conduct on December 20. But there is no evidentiary support for that assumption, and the assumption is directly contrary to the facts found by the jury.

The Seventh Amendment guarantees that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Fifth Circuit did not find that the jury findings were contrary to the weight of the evidence or lacked substantial basis in the evidence. And in fact, the jury findings are amply substantiated by the record. Rodriguez waited seven weeks after the incident in question to discharge Garza [Appendix, p. 239 (trial transcript)]. Rodriguez made no move whatever to terminate or even discipline Garza until the day Garza advised him of his intent to sue a policeman for brutality, arising out of a non-employment-related incident [Appendix, p. 249 (Trial)].

The jury considered Rodriguez' February 6 termination letter to Garza, on which the Appeals Court relied (559 F2d at 261; p. 14a), since that letter was Plaintiff's Exhibit 1 at trial (Appendix, p. 321). As Special Interrogatory I demonstrates, the jury rejected the letter as evidencing Rodriguez' true motivation for the termination.

Further substantiation of the integrity of the jury verdict is that, subsequent to the trial, Rodriguez himself, unlike Garza, was convicted of a misdemeanor (driving

while intoxicated), but was not terminated from his job. Garza requested the Court of Appeals to judicially notice the official court records of that conviction.

The Court of Appeals' incorrect application of Mt. Healthy effectively redetermined the facts found by the jury, a process prohibited by Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962).

In these circumstances, proper application of Mt. Healthy to the facts found by the jury would compel a ruling for Garza, not for Rodriguez. At the least, since the District Court did not have the benefit of Mt. Healthy for guidance at trial, the Fifth Circuit should not have reversed the jury verdict for Garza but should have remanded to the lower court for a Mt. Healthy hearing. That is precisely what happened in Mt. Healthy itself and more recently in Bernasconi v. Tempe Elementary School District, 548 F2d 857 (9th Cir. 1977), cert. denied, 54 L.Ed.2d 82 (October 3, 1977). (In fact, the second question presented to the Court for certiorari in Bernasconi was whether it was error for the Court of

Appeals to remand for a Mt. Healthy hearing.)

Ironically, the principal case, other than Mt. Healthy, upon which the Fifth Circuit relied, Stewart v. Bailey, 556 F2d 281 (5th Cir. 1977) (see p. 14a), was itself later reversed by the Fifth Circuit on rehearing and was remanded to the district court for a Mt. Healthy hearing. Stewart v. Bailey, 561 F2d 1195 (1977).

Similarly, this Court recently granted certiorari, vacated judgment, and remanded a Ninth Circuit case for a Mt. Healthy hearing regarding a discharged school teacher. Murray v. Wagle, 431 U.S. 935 (1977).

The Second Circuit reversed and remanded a criminal conviction under the Railway Labor Act because the lower Court did not properly instruct the jury on dual motivation (proper and improper intent) under Mt. Healthy. United States v. Winston, 558 F2d 105 (1977).

The jury having thus determined the Mt. Healthy facts in this case, the Court of Appeals was bound to apply those facts favorably to Garza and either affirm, or at least remand to the District Court for

a more specific Mt. Healthy hearing.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted, the judgment of the Court of Appeals vacated, and the case remanded for a determination consistent with Mt. Healthy Board of Education v. Doyle.

Respectfully submitted,

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May 1978

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ELISEO GARZA

V.

AMADOR RODRIGUEZ, ET AL.

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CA NO. 76-B-65

JUDGMENT

The above entitled action having been tried before a jury on May 6 and May 7, 1976, and the jury having answered Special Interrogatories as follows:

Special Interrogatory No. I

We, the Jury, find that the principal reason Amador Rodriguez decided to discharge Eliseo Garza was that he criticized the police before his employer and others, and because Mr. Garza eventually filed suit against officers of the Brownsville Police Department.

Special Interrogatory No. II

We, the Jury, find that the actions of Eliseo Garza did not impede proper performance of his daily duties as an employee of the Juvenile Probation Department or substantially impede the legitimate operation of the Department.

Special Interrogatory No. III

Plaintiff suffered actual damages to the present date in the amount of \$-0-.

Special Interrogatory No. IV

Plaintiff will suffer damages in the form of loss of future earnings as is reasonably certain to result directly from Defendants' actions in the amount of \$-0-.

Special Interrogatory No. V.

We, the Jury, find that Amador Rodriguez did not know or reasonably should have known that the action he took would violate the constitutional rights of Eliseo Garza, and that Amador Rodriguez did not act with the malicious intention to cause a deprivation of constitutional rights or other injury to Eliseo Garza.

and the Court having filed its order of September 3, 1976, setting out certain supplemental findings pursuant to Rule 49(a), Federal Rules of Civil Procedure;

It is therefore ORDERED, DETERMINED, ADJUDGED, AND DECREED:

1. That Defendants are hereby enjoined, ordered, and directed to reinstate Plaintiff Eliseo Garza in his position as investigator in the Juvenile Probation Department of Cameron County, Texas, as of the date of signing of this final judgment.

2. That Defendants are hereby enjoined, ordered, and directed to restore to Plaintiff credit for vacation time taken from him after March 12, 1976.

3. That Defendants are perpetually enjoined and restrained from further obstructing or punishing Plaintiff for exercising his constitutional rights and from further attempts to dismiss Plaintiff for any cause arising prior to March 12, 1976.

4. That Defendants' actions violated Plaintiff's rights of freedom of expression and of due process of law under the First and Fourteenth Amendments of the Constitution of the United States and 42 U.S.C. §1983.

5. That Plaintiff recover of Defendants his costs of action.

SIGNED this 3rd day of September 1976.

/S/ Owen D. Cox
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ELISEO GARZA

V.

AMADOR RODRIGUEZ, ET AL.

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CA NO. 76-B-65

MEMORANDUM AND ORDER

Eliseo Garza, the Plaintiff herein, was an employee of Cameron County in the Juvenile Probation Department. He had been with that department for several months and had been promoted to the post of an investigator shortly before the December 20, 1975 incident occurred. In such capacity, as the Court understands it, he was answerable to Amador Rodriguez, the Director of the Department, who was answerable, in turn, to one of the State District Judges in Cameron County, Texas, who was then acting as the Juvenile Court Judge. The facts which happened on said date, as the Court finds them to be relate to the matter of Plaintiff Garza's dismissal from the Juvenile Probation Department. Pursuant to Rule 49(a), the Court makes the following additional findings in order to supplement the findings of the jury with regard to any omitted issues.

On the night in question, Garza and his girlfriend had been to a party and both admitted to having had six drinks of bourbon and Coca Cola. The term "six drinks" really means very little unless you know whether the drinkers were using a jigger or sloshing the bourbon into a glass from the bottle. In any event, about one o'clock in the morning, or perhaps a little bit later, Garza and his girlfriend left the party. They had had a disagreement and, because of this, Garza parked his pickup truck in which they were riding at some place

in a city park there in Brownsville because he wanted to discuss their problem. While so engaged, a police car drove up and stopped. A policeman stepped down, went to the passenger's side of Defendant's truck, and asked the young lady if Garza was giving her any trouble. There was a passenger in the police car. Both Garza and his girlfriend testified that they were not saying anything at this moment, but the policeman's inquiry indicates otherwise.

In any event, after having talked to the young lady, the officer went around to the driver's side of the pickup and asked Garza for his driver's license. Garza objected to producing his driver's license, but began to search in the glove compartment of the pickup for his identification card. No justifiable reason was given by Garza for his failure to show his license. Apparently he would not show the police officer his driver's license because he was not driving at the time, which, of course, was not plausible. At this point in the testimony, it was clear to this Court, as it must have been to the police officer at the time, that Garza was not sober and that, as a result of his inebriated condition, Garza was belligerent and evidenced a demand for some sort of preferential treatment because he was a probation officer. When Garza was unable to locate his I.D. card, and because he had refused to produce his driver's license, the officer took him out of the truck, arrested and handcuffed him. We note that at this time the evidence shows the police officer was solicitous of Garza's girlfriend because of her predicament. We see no fault on the part of the police officer at this point.

Garza was then taken to the county jail. To what extent, if any, the other individual in the police car participated in the arrest of Garza in getting him to the county jail is not clear. As the Court recalls the testimony, at some point one of the officers sprayed mace in Garza's face in order to subdue him. He was taken to the booking

room in the sheriff's office. Here, Plaintiff claimed he was further abused. But, this Court need not decide the extent of such abuse, if any, as was dealt to Garza at this time and it will not do so. There is, however, little doubt that while being booked Mr. Garza was himself abusive of the jail officials and used foul language as to everyone who seemed to be close at hand. Garza's claim was that the mace had blinded him, that he was disoriented and just didn't know where he was.

One of the first things Garza asked for after he was inside the jail at the booking desk was a telephone. He told the jailer that he wanted to call his superior in the Juvenile Probation Department, Amador Rodriguez. The jailer called Rodriguez for Garza. This, however, upset Garza, who had apparently changed his mind about talking to Rodriguez. In any event, and pursuant to the telephone call, Rodriguez went to the jail and while he was trying to find out what the problem was, Garza cursed him along with everybody else. Garza was finally calmed down and after a while the jail officials permitted Rodriguez to take Plaintiff Garza home.

Sometime during the next day or so, Amador Rodriguez talked to Garza about the incident and Garza was concerned about what might happen to him. Garza was told he could be suspended for ninety days or he might be discharged. At the time of the conference, the Court concludes there was just cause to terminate Garza's employment because of his behavior on December 20th.

Several weeks passed during which nothing was said between Rodriguez and Garza about the incident. Garza continued with his work as an investigator in the Juvenile Probation Department and seemingly was performing satisfactorily. Then, Amador Rodriguez was advised by a member of the District Attorney's staff in Cameron County, Texas, at a chance meeting, that Garza had filed a civil suit

against the city policemen who had arrested him, claiming civil rights violations in connection with his arrest and incarceration. After receiving such information, Rodriguez called Garza into his office and told him that he should not have brought the lawsuit without first advising Rodriguez of what he intended to do. As Director of the Juvenile Probation Department, Rodriguez told Garza that he was concerned about the effect such a lawsuit might have on the Juvenile Probation Department's relationship with the Police Department. Rodriguez shortly thereafter did confer with the Juvenile Court Judge in Cameron County, Texas, as to what action should be taken. Subsequently, Amador Rodriguez told Garza, because of all the circumstances, he was fired.

This Court is of the opinion that had Rodriguez fired Garza shortly after the incident in the park and the disturbance which carried on into the jail, he would have been within his authority in doing so, and Garza would have had no legal recourse for such action. However, having waited several weeks, as he did, Rodriguez may have been, as the Court views it, on shaky ground. However, we are not here concerned with the compensatory and the punitive damages to which Garza may have been entitled to receive. The jury gave him nothing.

What we must now decide is whether or not Garza should be reinstated as an investigator with said Cameron County Juvenile Probation Office. As far as the Court was concerned, his refusal to show his driver's license and his insistence on identifying himself as a juvenile probation officer was certainly unbecoming an officer in any department. While the Court has already concluded that the facts relating to this matter were such as to authorize, at one point in this story, the termination of Garza's employment, we must, however, still answer the question of whether or not the delayed firing was of such doubtful validity as to require the Juvenile Probation Department to reinstate the Plaintiff. This Court concludes that Eliseo Garza

should be reinstated in the position as an investigator in the Juvenile Probation Department of Cameron County, Texas, as of the date of the final judgment in this case, which will be signed and ordered entered as of the date of this Memorandum and Order.

Plaintiff requests injunctive relief ordering Defendants to restore to Plaintiff credit for vacation time taken from him after March 12, 1976. Since the findings of the jury, and the supplemental findings of this Court, have established that Plaintiff was improperly discharged, Plaintiff should not have been forced to take vacation time after March 12, 1976. This relief will be granted.

Plaintiff requests injunctive relief enjoining Defendants and their employees and agents from further obstructing or punishing Plaintiff for exercising his constitutional rights and from further attempts to dismiss Plaintiff for any cause arising prior to March 12, 1976. The Court is convinced that Defendants will abide by the determination of Plaintiff's rights made in this case, and that Defendants will not "further obstruct or punish Plaintiff for exercising his constitutional rights." Therefore, at this time the Court will deny this relief.

The complaint requests declaratory relief that Defendant's actions violated Plaintiff's rights of freedom of expression, and of due process of law, in violation of the First, Fifth, and Fourteenth Amendments of the Constitution of the United States, and of 42 U.S.C. §1983. This relief will be denied.

The complaint prays for actual damages in the amount of \$10,000 and punitive or exemplary damages in the amount of \$25,000. The jury's answers to Special Interrogatories Nos. III and IV found against Plaintiff on the issue of actual damages. Punitive damages are recoverable in section 1983 actions in certain circumstances. Palmer v. Hall, 517 F.2d 705 (5th Cir. 1975); Mansell v. Saunders,

372 F.2d 573 (5th Cir. 1967); 14 A.L.R. Fed 608 (1973). In general, however, punitive damages may be imposed only if a defendant has "acted wilfully and in gross disregard for the rights of the complaining party." Lee v. Southern Home Sites Corporation, 429 F.2d 290 (5th Cir. 1970). This issue overlaps substantially with the finding of the jury in Special Interrogatory No. V, and, if necessary, the Court makes the additional finding that the evidence in this case did not justify the imposition of punitive damages.

Finally, the complaint requests that Plaintiff recover costs and "a reasonable attorney's fee." Plaintiff's request for costs will be granted, but attorney's fees will not be allowed. The mere fact that litigation involves "issues of civil rights does not in itself justify an award of attorney's fees." Roane v. Callisburg Independent School District, 511 F.2d 633 (5th Cir. 1975); Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975). Plaintiff has not shown that Defendants "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975). Again, Special Interrogatory No. V is relevant to this issue, and the Court makes the additional finding that Plaintiff did not present evidence to bring this case within one of the attorney's fees exceptions of Alyeska, supra.

Copies of this Memorandum and Order shall be furnished to appropriate counsel.

SIGNED this 3rd day of September, 1976.

/S/ Owen D. Cox
UNITED STATES DISTRICT JUDGE

ELISEO GARZA, Plaintiff-Appellee,
Cross-Appellant,

v.

AMADOR RODRIGUEZ, etc., Defendant,

The County of Cameron, Defendant-
Appellant, Cross-Appellee.

No. 76-3898.

United States Court of Appeals,
Fifth Circuit.

Sept. 14, 1977.

Orrin W. Johnson, Harlingen, Tex.,
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erties Union Foundation, New York City, for
Eliseo Garza.

Appeals from the United States District
Court for the Southern District of Texas.

Before GEWIN, RONEY and HILL, Circuit
Judges.

RONEY, Circuit Judge:

Eliseo Garza was an investigator for the Juvenile Probation Department of Cameron County, Texas. On the night of December 20, 1975, after a party, he was arrested for being drunk. He became belligerent, demanded preferential treatment as a probation officer, used abusively foul language, cursed the director of his department who was called to the police station, among others, finally calmed down and was permitted to go home. On February 6, 1976, he was fired.

Since the firing took place only after Garza indicated that he was going to sue the police, he filed suit against his department director, Amador Rodriguez, and the County claiming unconstitutional employment discharge. He requested a declaratory decree, damages, and an injunction.

A jury awarded no damages, but the district judge subsequently entered a mandatory injunction ordering defendants to reinstate Garza to his job. The County appeals the injunction; Garza cross-appeals the failure to award back pay. We reverse the injunction, and affirm on the cross-appeal.

[1] The parties dispute jurisdiction. Plaintiff concedes that the County is not a person against whom a cause of action can be asserted under 42 U.S.C.A. § 1983. See City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973). Plaintiff asserts federal question jurisdiction, however, under 28 U.S.C.A. § 1331 claiming an

amount in controversy in excess of \$10,000. By the time the case came up for the district court equitable relief, the jury had already decided that the plaintiff suffered no damage. But the amount in controversy, not the actual damages sustained, controls this jurisdiction.

[2] In St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-289, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938), the Supreme Court held that "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." At the time Garza brought this suit he was still unemployed. He sought back pay at a rate of \$800/month and alleged bad faith and malice which could entitle him to recover punitive damages. Although the jury did not award Garza any monetary damages, it was far from a "legal certainty" at the time of suit that he would not be entitled to more than \$10,000. See Mount Healthy City Board of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), 45 U.S.L.W. 4079, 4080 (Jan. 11, 1977). It appears, therefore, the County was properly before the district court pursuant to its § 1331 jurisdiction.

[3] We cannot sustain, however, the district court's holding that plaintiff was improperly discharged. The Texas statute, Tex.Rev.Civ.Stat. art. 5142 (Vernon 1971), governing removal of juvenile probation officers, bestowed upon the County the authority to discharge Garza for any reason, or even for no reason "at any time." Nevertheless, he could not be discharged for the exercise of his constitutional rights. Perry v. Sindermann, 408 U.S. 593, 597, 92

S.Ct. 2513, 33 L.Ed.2d 570 (1972).

Garza's behavior and speech at the police station on December 20, 1975, have no constitutional First Amendment protection. Lewd, obscene, profane, slanderous "fighting" words are not entitled to constitutional protection. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Nor can an employee claim First Amendment protection for speech used against him not because of speech itself, but because the speech evidences character traits undesirable in an employee. Megill v. Board of Regents, 541 F.2d 1073, 1085 (5th Cir. 1976). Since the district court found that Rodriguez had just cause to terminate Garza's employment because of the police station behavior, the question becomes whether the taking into consideration the threat to file a lawsuit invalidates the decision to fire.

[4] Clearly, discharge because of the filing of a lawsuit can escape constitutional invalidity if such act affects the employee's ability to perform his job. Abbott v. Thetford, 534 F.2d 1101 (5th Cir. 1976) (en banc), cert. denied, 430 U.S. 954, 97 S.Ct. 1598, 51 L.Ed.2d 804 (1977), 45 U.S.L.W. 3666 (April 5, 1977). Even though Rodriguez testified he was concerned about the effect such a lawsuit would have on the probation department's work with the police department, the jury and the judge found Garza's actions did not impede either the proper performance of his daily duties or the legitimate operations of the department.

On the other hand, in a decision not yet available to the district court in this

case, the Supreme Court has recently rejected the notion that if "protected conduct played a part, 'substantial' or otherwise, in a decision" to fire, the decision would necessarily amount to a constitutional violation justifying action. Mount Healthy City Board of Educ. v. Doyle, supra 429 U.S. at 284, 97 S.Ct. 568. Applying the lessons of Mount Healthy to the facts of this case as found by the district judge requires reversal. The district judge found the County could have fired Garza because of his conduct of December 20, the basis of the termination notice given to Garza by Rodriguez: "My decision is primarily based on your conduct of December 20, 1975, which I regard as unbecoming an officer of this department." Cf. Stewart v. Bailey, 556 F.2d 281 (5th Cir. 1977) (dismissal reasonably justified by unprotected conduct valid even if motivated in part by arguably protected speech).

Shortly after the December 20 incident, Rodriguez informed Garza he could be put on probation or dismissed. About six weeks later, when Rodriguez learned from others of the intended lawsuit, he told Garza that he should have been advised of Garza's intentions regarding a suit against the Police Department. He was upset because Garza had not approached him on the matter and thought it indicated a lack of respect for his superior's position. After conferring with the juvenile court judge as to what action should be taken, he gave the termination notice. Several weeks later, Garza filed suit against the police. Presumably, however, once Garza's attitude was revealed by the declared intention to file the lawsuit without consulting his superiors, he was

fired, and would have remained so, whether or not he later filed a lawsuit.

Certainly, the police lawsuit was directly related to Garza's conduct which would justify firing, and if held to insulate him from discharge could place him "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." 429 U.S. at 285, 97 S.Ct. at 575.

The district court stated as follows:

This Court is of the opinion that had Rodriguez fired Garza shortly after the incident in the park and the disturbance which carried on into the jail, he would have been within his authority in doing so, and Garza would have had no legal recourse for such action. However, having waited several weeks, as he did, Rodriguez may have been, as the Court views it, on shaky ground. However, we are not here concerned with the compensatory and the punitive damages to which Garza may have been entitled to receive. The jury gave him nothing.

What we must now decide is whether or not Garza should be reinstated as an investigator with said Cameron County Juvenile Probation Office. As far as the Court was concerned, his refusal to show his driver's license and his insistence on identifying himself as a juvenile probation officer was certainly unbecoming an officer in any department. While the Court has already concluded that the facts

relating to this matter were such as to authorize, at one point in this story, the termination of Garza's employment, we must, however, still answer the question of whether or not the delayed firing was of such doubtful validity as to require the Juvenile Probation Department to reinstate the Plaintiff. This Court concludes that Eliseo Garza should be reinstated in the position as investigator in the Juvenile Probation Department of Cameron County, Texas, as of the date of the final judgment in this case, which will be signed and ordered entered as of the date of this Memorandum and Order.

Under these circumstances, neither the formed intention to file the lawsuit, nor the filing of the lawsuit was constitutionally protected conduct which would prevent Garza's employer from using that as a part of the reason for firing him. It appears that the thrust of Mount Healthy leads to the conclusion based on the total opinion of the district court that there was no violation of Garza's rights upon which to posit equitable relief.

Much is made of an interrogatory which appellee contends was answered favorably by the jury.

We, the Jury, find that the principal reason Amador Rodriguez decided to discharge Eliseo Garza was that he criticized the police before his employer and others, and because Mr. Garza eventually filed suit against officers of the Brownsville Police Department.

This interrogatory, however, couples the clearly permissible with the possibly impermissible, and does not dispose of the case under Mount Healthy, which expressly recognizes that the two may be intertwined without constitutional fault.

The jury decided that plaintiff was entitled to no damages. The denial of back pay must be affirmed. The injunctive relief ordered by the district court must be reversed.

REVERSED ON THE DIRECT APPEAL.

AFFIRMED ON THE CROSS APPEAL.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3898

D. C. Docket No. CA-76-B-65

Eliseo GARZA, Plaintiff-Appellee,
Cross-Appellant,

v.

Amador RODRIGUEZ, etc., Defendant,

The County of Cameron, Defendant-
Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Texas

Before GEWIN, RONEY and HILL,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby,

reversed as to the direct appeal and affirmed as to the cross appeal;

It is further ordered that plaintiff-appellee cross-appellant pay to defendant-appellant cross-appellee, the costs on appeal to be taxed by the Clerk of this Court.

September 14, 1977

Issued as Mandate: March 1, 1978

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UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

February 21, 1978

Edward W. Wadsworth
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

NO. 76-3898 - GARZA v. AMADOR RODRIGUEZ, ETC.,
THE COUNTY OF CAMERON

Dear Counsel:

This is to advise that an order has this day been entered denying the petition() for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition() for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure

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for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By s/Brenda M. Hauck
Deputy Clerk

*on behalf of appellee, Eliseo Garza,

bmh

cc: Mr. Orrin W. Johnson
Mr. Joe K. Hendley
Messrs. James C. Harrington
James A. Douglas